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IN THE

Supreme Court of the United States

1971 - October Term
No.

NEW YORK DISTRICT COUNCIL NO. 9, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

ASSOCIATION OF MASTER PAINTERS AND DECORATORS OF THE CITY OF NEW YORK, INC.,
Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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(2972)

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1971 - October Term

No. _____

NEW YORK DISTRICT COUNCIL NO. 9, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL-CIO,

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ASSOCIATION OF MASTER PAINTERS AND DECORATORS OF THE CITY OF NEW YORK, INC.,

Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the above, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner above named (formerly known as New York District Council No. 9, Brotherhood of Painters, Decorators & Paperhangers of America (AFL-CIO), prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered on the 19th day of January, 1972, in the above case.

CITATION OF OPINIONS BELOW

The decision and judgment of the Court of Appeals for the Second Circuit, denying petitioner's application for review of an order of the National Labor Relations Board, and granting that Board's cross-petition for enforcement, is included herein as Appendix A (pages A-1 to A-14). The opinion has not been officially reported, but it appears at 79 LRRM

2145.

The decision and order of the National Labor Relations Board found that Petitioner had committed an unfair labor practice in violation of Section 8(b)(3) of the National Labor Relations Act, as amended (29 U.S.C. sec. 158(8)(b)(3)(the Act). Such decision and order is reported in 186 NLRB No.140, and is printed as Appendix B hereto (A-15 to A-46).

The Trial Examiner's decision upon which the National Labor Relations Board decision and order was based is unreported and is printed as Appendix C hereto (A-47 to A-86).

JURISDICTION

The judgment sought to be reviewed is that of the Court of Appeals for the Second Circuit entered on January 19, 1972. No petition for a rehearing was filed.

Jurisdiction of this Court is invoked

under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

Section 8(b)(3) of the National Labor Relations Act, as amended (29 U.S.C. Section 158(8)(b)(3)) reads, in pertinent part, as follows:

> "It shall be an unfair labor practice for a labor organization or its agents--
>
> (3) To refuse to bargain collectively with an employer . . . ."

Section 8(d) of the Act (29 U.S.C. Section 160(d)) reads, in pertinent part, as follows:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employ-

ment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof . . . ;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days of such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, which-

ever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) . . . shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. . . ."

Section 10(b) of the Act, as amended (29 U.S.C. Section 160(b)) reads, in pertinent part, as follows:

". . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. . . ."

STATEMENT OF THE CASE

Facts. */

Shortly before Frank Schonfeld, Secretary-Treasurer and principal executive officer of Petitioner (the Union) took office in 1967, the New York County Grand Jury handed down an indictment charging an unlawful bribery conspiracy of eight years duration among Schonfeld's predecessor in office, certain officials of the New York City Housing Authority, and various painting contractors, whereby in consideration of the payment of certain bribes by the contractors, the Union ignored their violations of the Union

---

*/ Although the Board refused to adopt the Trial Examiner's recommendations, it adopted his findings to the extent that they were consistent with its own decision. The facts recited herein are from the Trial Examiner's findings to the extent that such findings are consistent with the Board's decision.

contract and the Housing Authority officials ignored violations of the specifications of the painting contracts. Since painting costs to the Housing Authority did not increase despite substantial bribes, those injured by the conspiracy were the tenants who received inferior work and the painters who were subjected to both speedup practices and the effects of violations of the Union's rules and regulations designed to protect their health and safety and the quality of their work (A-55 to A-56).

Schonfeld's administration tried unsuccessfully to correct these practices (A-56 to A-57) and then, on March 5, 1968, the Union adopted a rule effective April 1, 1968 prohibiting its members from painting in excess of ten rooms per man per week on repaint work in Housing Authority projects (A-57 to A-59) on the theory that a qualified, diligent painter could not do more except as a result of violating the trade rules

of the collective bargaining agreement (A-57). The employers were duly notified of the new rule (A-60 to A-62). The Intervenor (the employers' Association) wrote the Union on March 16, 1968, and took the position that this rule violated the Trade Agreement in that it was a unilaterally promulgated rule conflicting with the provisions of said agreement (A-63 to A-64). The Union replied by letter dated March 18, 1968, that the rule did not conflict with the existing Trade Agreement and was reasonable in the light of the situation (A-64 to A-65).

The Association decided not to press the matter because the existing collective bargaining agreement (called "the Trade Agreement") was to expire on July 31, 1968, and negotiations for a new agreement were imminent (A-66 to A-67). Negotiations commenced in June 1968, and the Union's demands included one providing generally for the Union's right to set a maximum standard

of production, while the Association sought a clause forbidding the Union to set such a standard. The Association's demand was abandoned relatively early in the negotiations, but the Union's demand was the subject of extensive discussion both before and after the strike, which was called on the expiration of the agreement (A-67 to A-70). The Trial Examiner found that the new agreement, effective September 9, 1968, contained no change relating to the Union's right to establish such quotas, and found the position of the respective parties concerning said quotas was unchanged (A-70).

After the new agreement was signed, the Union continued to implement the rule (A-74 to A-75). However, although the employer discharged and docked the pay of Union members for observing the rule (A-79), the Union took no action against its members for violations of the rule, or against employers for their discip-

linary acts against the Union's members (A-78 to A-79). The charges herein were filed on December 27, 1968 by five Association members and three painting contractors who were not in the Association.

Questions Presented For Review

1. In light of Local Lodge No. 1424, International Association of Machinists (Bryan Mfg. Co.) v. N.L.R.B., 362 U.S. 411 (1960), did the filing of NLRB charges against petitioner-union more than six months after the promulgation and implementation of a union rule limiting the work output by its members render the complaint time-barred under Section 10(b) of the National Labor Relations Act where, within the six-month period, the Union continued to implement this rule after unsuccessfully bargaining to provide for a similar work limitation in the collective bargaining agreement?

2. Does a union's continued implementation of its rule limiting the work output by its members, after the union has been unsuccessful in obtaining a similar work limitation provision in a new collective bargaining agreement, constitute a refusal to bargain within the meaning of Section 8(b)(3) of the National Labor Relations Act?

3. Does the National Labor Relations Board's order affirmed below go beyond the Board's jurisdiction by interpreting and policing the collective bargaining agreement?

Reasons for Granting the Writ.

I. The National Labor Relations Board complaint was time-barred under Section 10(b) of the Act because the charges were filed more than six months after the union rule was promulgated and first implemented.

The Union rule under consideration herein was promulgated in March 1968, effective April 1, 1968 (A-3). The charges against petitioner were not filed with the N.L.R.B. until December 27, 1968, more than nine months later (A-5). Nevertheless, the Court of Appeals held that the complaint was not time-barred by Section 10(b) of the National Labor Relations Act, which bars complaints filed more than six months after the occurrence of an unfair labor practice, stating that the continued enforcement of the rule violated the new collective bargaining agreement entered into in September 1968 and thereby gave rise to a distinct unfair labor practice.

The holding of the Court of Appeals appears to be directly opposed to this Court's leading decision on the subject in Local Lodge No. 1424, International Association of Machinists (Bryan Manufacturing Co.) v. N.L.R.B., 362 U.S. 411 (1960). In Bryan, this Court faced the issue of whether the six-month period runs from the time of continued enforcement of an illegally obtained union security clause, or whether it runs from the execution of the collective bargaining agreement in which it was first contained.

This Court held that the time period runs from the date the agreement was executed and that a complaint filed more than six months thereafter was time-barred even though the union security clause had been enforced within the six-month period. Noting that the Union security clause was lawful on its face and could be considered unlawful only by reason of the circumstances which existed on the

date of execution of the agreement, the Court said:

> ". . . [I]f the Section 10(b) proviso is to be given effect, the enforcement, as distinguished from the execution, of such an agreement as this constitutes a suable unfair labor practice only for six months following the making of the agreement." 362 U.S. 411 at 423 (emphasis in the original).

The Court clarified the statute's application by distinguishing two different situations as follows:

> "The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the

limitations period; and for that purpose Section 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely 'evidentiary,' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice." (Pages 416-417)

The instant case falls in the second category thus described. Enforcement of a Union work limitation rule is not per se an unfair labor practice. Scofield v. N.L.R.B., 394 U.S. 423 (1969). There is no dispute that although no agreement on the rule was achieved, the Union and the employers had bargained over it during the negotiations leading to the September 1968 agreement, nor is there any suggestion that the Union did not bargain in good faith. From the terms of the Board order, in fact, it appears that the gravamen of its complaint against the Union was not the lack of bargaining immediately prior to the September agreement or subsequently, but its failure to bargain prior to promulgating and effectuating the rule in March, since the Board has ordered that the Union

"Upon request, bargain collectively in good

faith with the above-named Employers prior to the enforcement of any production quota in the appropriate bargaining units performing the above work" (A-29; emphasis supplied).

It is thus implied that the order was directed at correcting the Union's refusal to bargain when, upon promulgation of the rule in March, the Union had rejected the employers' requests for a grievance proceeding and for arbitration (A-18; A-65 to A-66).

In spite of these clear implications, however, the Board stated that its decision was based on the ground that the Union had unilaterally effected changes in the terms of the new contract by means of limiting weekly production to ten rooms. But, as Judge Hays said in his dissenting opinion below, the five-day, seven-hour-per-day work week, does not provide

for any quantum of production and cannot be "magically transformed" into provisions specifying "the rate of speed at which employees are to work or the amount they are to produce" (A-11). The rule represented no clear or distinct breach of the September contract that would support a charge of unilateral action and it could be said to violate that contract, if at all, only if the establishment of the rule in March had violated the contract then in existence. In such event, however, the charge could not be sustained as a "continuing violation," a theory rejected in Bryan where this Court said:

> "It is apparently not disputed that the Board's position would withdraw all limitations protection from collective bargaining agreements attacked on the ground asserted here. For, once the principle

on which the decision below rests is accepted, so long as the contract -- or any renewal thereof -- is still in effect, the six-month period does not even begin to run." 362 U.S., 411, 425.

The decision of the Second Circuit, although purporting to find a new "distinct" violation of the renewal made in September, represents a flight from the principles enunciated by this Court in its earlier decisions in Bryan and Scofield. The instant case represents an opportunity for this Court to clarify those decisions for the proper administration of the National Labor Relations Act.

II. The implementation and enforcement of the Union rule limiting the output of its members was not a refusal to bargain within the meaning of the statute.

In N.L.R.B. v. Insurance Agents' Internat-

ional, 361 U.S. 477 (1960), at Note 28, this Court expressly left open the question of whether unilateral imposition by a Union establishing new terms and conditions can be treated analogously to similar conduct on the part of an employer as being in violation of the duty to bargain. Subsequently, this Court, in the context of an employer's unilateral conduct, declared that the gravamen of unlawful unilateral conduct is "behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement." N.L.R.B. v. Katz, 369 U.S. 736 (1962), at 747. Cf. N.L.R.B. v. Landis Tool Co., 193 F. 2d 279 (3rd Cir., 1952), and see the dissent of Board Member Fanning in the N.L.R.B. order under consideration herein (A-31 et seq.). The Katz opinion distinguished

Insurance Agents' by noting that in the latter case the Union "had not in any way foreclosed discussion of any issue, by unilateral actions or otherwise. 369 U.S. at p. 747. In this connection, the Second Circuit itself has pointed out that a Union can only demand changes from an employer, but cannot unilaterally effect changes because conditions of employment require the employer's acquiescence. Cutler v. N.L.R.B., 395 F. 2d 287 (1968), 290.

The instant case brings these legal issues to the forefront. Here the Union announced the 10-room rule to the employers early in March 1968, to be effective April 1, 1968. Soon thereafter, when its collective bargaining agreement was about to expire, it bargained about the rule from June through early September of 1968, when it entered into a new agreement in which, however, the 10-room rule was not included because no conclusion had been reached about it at

the bargaining table. Although it continued to implement the rule, the Union took no action against its members who violated the rule. On the other hand, some employers took punitive action against Union members who complied with the rule, discharging them from employment or docking their pay and finally filing charges against the Union before the National Labor Relations Board more than nine months after the rule's promulgation.

As the record indicates, the Union rule was adopted in an effort to remove and rectify the pervasive corruption that had become the norm in Housing Authority painting work and the Union felt constrained to take this far-reaching step in order to bring this section of the industry into compliance with its trade rules designed to protect the health and safety of its members and to prevent speed-up practices. This Court has upheld such Union productivity

rules where the motivation of the employees was far less compelling. Scofield v. N.L.R.B., 394 U.S. 423 (1969). As in the Scofield case, the Union rule here had been duly adopted, it reflected a legitimate Union interest, and it did not frustrate an overriding policy of the labor law.

The majority opinion in the Court of Appeals seeks to distinguish the Scofield case on the ground that in that case the rule and its enforcement did not violate the collective bargaining agreement. Petitioner contends, however, that in the instant case no such violation results from the implementation of the rule. As Judge Hays pointed out in his dissent below, and as has been adverted to above under Point "I" herein:

> "What the majority actually holds, in effect, is that the union's conduct in promulgating and seeking to enforce its work limitation rule violated the provisions of

the collective agreement, specifically the provision stipulating a five day, seven-hour per day work week. However the ordinary and usual wages and hours provisions contained in a collective agreement cannot be magically transformed into provisions specifying the rate of speed at which employees are to work or the amount they are to produce. There was no provision whatever in the agreement requiring the union members to paint 11.5, or for that matter any particular number, of rooms per week. Under Scofield v. NLRB, 394 U.S. 423 (1969), the union could properly adopt and enforce on its members a rule such as the one here involved. Since the employer had no right under the collective agreement to demand that employees paint any specific number of rooms per day, the union retained the power to act unilaterally with respect to that

issue. The employer's recourse was either to discharge those painters who did not paint the number of rooms per day the employer considered satisfactory, or to secure from the union an agreement not to promulgate a work limitation rule."

The majority opinion of the Court below relies on Associated Home Builders of the Greater East Bay, Inc. v. N.L.R.B., 352 F. 2d 745 (9th Cir., 1965), which, however, was not based on a charge of Section 8(b)(3) of the Act, but of 8(b)(1)(A). Furthermore, in Associated, the Union's production quota had never been the subject of collective bargaining, while in the instant case the parties had engaged in extensive bargaining over the rule.

Petitioner submits that the resolution of the issue thus presented requires elucidation concerning the requirements of Section 8(b)(3) of the National Labor Relations Act, particularly

in the light of the sharp differences of opinion evidenced both in the National Labor Relations Board and among the Second Circuit's panel members in this case.

III. The Board acted beyond its jurisdiction by interpreting and policing the collective bargaining agreement.

This Court has found that it was the legislative intention that the enforcement of collective bargaining agreements "should be left to the usual processes of the law and not to the National Labor Relations Board." Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 511 (1961). Furthermore, this Court found that Congress expressly rejected a policy whereby the Board would have jurisdiction with respect to the policing of "violations of collective bargaining agreements by rejecting the proposal that such violations be made unfair labor practices. Instead, Congress deliberately chose to leave the enforcement of collective agreements

'to the usual processes of the law'" (Idem., p. 513).

In N.L.R.B. v. C & C Plywood Corp., 385 U.S. 421 (1967), this Court reaffirmed the principle that the Board does not have general jurisdiction over all alleged violations of collective bargaining agreements, but that, in accordance with Congressional intention, such matters are within the jurisdiction of the Courts. Although the Board may interpret such agreements to determine that a party actually possessed the statutory safeguards to entitle it to Board action, such interpretation may go only so far as is necessary for that purpose. Idem., p. 428. However, even this limited power, it was strongly indicated, would not be available where the parties had provided for arbitration. Idem., p. 428.

In the instant case, the Board concluded that by abiding by the 10-room rule, Union members were violating the provisions for a seven-

hour day and five-day week in the collective bargaining agreement. In making this determination, the Board did precisely what this Court noted had not been done by the Board in the C & C Plywood case where the Board's conduct was found proper under the Act. This Court said:

> ". . . In this case the Board has not construed a labor agreement to determine the extent of the contractual rights which were given to the union by the employer." (385 U.S. at p. 428)

While the Court of Appeals denies that the Board has policed the agreement (A-9, Note 17), it is readily apparent, borrowing from the language in Judge Hays' dissent, that transforming ordinary wage and hour provisions in a collective bargaining agreement into a requirement for painting a particular number of rooms per week is a determination of the extent of the con-

tractual rights of the parties. Without such a determination, the Board could not have supported its decision. It necessarily acted outside of its province in issuing its order.

Also under the holding in the C & C Plywood case, the existence of provisions in the contract for arbitration */ would seem to have limited, if not preempted, the Board's jurisdiction of the case (385 U.S. at 426, 429).

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*/ The September 1968 contract, General Counsel's Exhibit No. 3, in the record before the Court of Appeals, contains the following arbitration requirements:

> ART. XIII. SECTION 1. JOINT TRADE BOARD: All grievances or complaints against members of either party to this Agreement for alleged violation of the same shall be heard and adjusted by the Joint Trade Board, comprised of three (3) members of the ASSOCIATION, designated by the ASSOCIATION, and three (3) members of the UNION, designated by the UNION.
>
> * * *
>
> SECTION 7. The decisions and findings of the Joint Trade Board, including any

On this issue, as well as the others discussed in this brief, there was difference of opinion among the members of the Court of Appeals

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*/ imposition of penalties, shall be final and binding upon the ASSOCIATION and the UNION, all members of each thereof and all interested parties.

SECTION 8. Upon the failure of the Joint Trade Board to adjust a grievance or to agree on a decision or finding, the matter shall be promptly submitted to an arbitrator whose decision and finding shall be final and binding upon the ASSOCIATION and the UNION and upon all members thereof, and interested parties thereto. All interested parties appearing before the Joint Trade Board agree in advance that the final decision of the Joint Trade Board is final and conclusive and that no right of appeal therefrom exists. No right of appeal similarly exists with respect to a decision and finding by an arbitrator.

SECTION 9. Findings and decisions shall be transmitted to the ASSOCIATION and to the UNION and each obligates itself to enforce such findings and decisions as the case may be.

panel whose decision is appealed from that would make it desirable for further clarification to be given by this Court.

CONCLUSION

For the stated reasons, this petition for a Writ of Certiorari should be granted.

April 14, 1972

Respectfully submitted

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 228—September Term, 1971.
No. 229

(Argued November 16, 1971 Decided December 27, 1971.)

Docket 71-1272 &
71-1560

NEW YORK DISTRICT COUNCIL No. 9, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

ASSOCIATION OF MASTER PAINTERS AND DECORATORS OF THE CITY OF NEW YORK, INC.,
Intervenor.

Before:

MOORE, HAYS, and MULLIGAN,
Circuit Judges.

Petition to review and cross-petition to enforce an order of the National Labor Relations Board ordering petitioner to cease and desist from enforcing a unilaterally imposed production quota and to bargain collectively on request with Intervenor.

Petition denied; cross-petition granted.

HENRY J. EASTON, New York, N. Y. (Easton & Echtman, New York, N. Y.), *for Petitioner.*

EUGENE B. GRANOF, Attorney, National Labor Relations Board (Peter G. Nash, General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Frank Vogl, Attorney, National Labor Relations Board), *for Respondent.*

FRED P. ELLISON, New York, N. Y. (French, Fink, Markle & McCallion, New York, N. Y.), *for Intervenor.*

MOORE, *Circuit Judge:*

New York District Council Number 9 of the International Brotherhood of Painters and Allied Trades, AFL-CIO (Union) petitions this court to review an order of the NLRB;[1] the Board cross-petitions for enforcement.[2] The Board's order provides, in relevant part, that the Union cease and desist from enforcing, unilaterally and without notice to or consultation with the charging parties herein,[3] any production quota against employees of the

1 Pursuant to section 10(f) of the National Labor Relations Act (Act), 29 U.S.C. §160(f) (1970). The trade agreement between the parties terminated on July 31, 1971. We do not know whether a new agreement has been negotiated, or whether the new agreement, if any, contains a provision dealing with production quotas. However, in view of the continuing character of the obligation imposed by the Board's order, we will examine the merits regardless of whether the case is moot. *See J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 334 (1944).

2 Pursuant to section 10(e) of the Act, 29 U.S.C. §160(e) (1970).

3 The eight charging parties are painting and decorating contractors. Five of the eight belong to the Association of Master Painters and Decorators of the City of New York, Inc. (Association), which represents its members in bargaining with the Union. The historical bargaining practice has been for the Union and the Association to negotiate a contract and, thereafter, for the independents to enter into substantially identical agreements with the Union.

charging parties performing work on New York City Housing Authority projects.[4] The order also requires the Union to, on request, bargain collectively in good faith with the charging parties prior to enforcement of any production quota.[5] We deny the Union's petition to review; we grant the Board's petition for enforcement.

I.

On March 5, 1968, the Union unanimously adopted at a special meeting a resolution, effective April 1, 1968, stipulating that no journeyman member employed on New York City Housing Re-paint work paint more than 10 rooms per week. According to the Union, the purpose of the rule is to relieve the pressure on painters to work quickly so as to reduce the number of violations of trade rules, increase the health and safety of union members, and improve the quality of their work. The Union sought to enforce the rule by requiring members to carry cards setting forth the rule and the penalties for violation, and by instructing union stewards to submit daily reports on production.

Prior to the announcement of this resolution, journeymen painted on average 11.5 rooms per week. The then existing collective bargaining contract made no reference to production quotas, but it did provide that Union members would work a seven-hour day, five-day work week.

On March 13, after receiving protests from members about the 10-room rule, Louis Elkins, secretary of the Association, informed the Union that the rule was contrary to a long-established trade principle, and that it violated Article XXII of the existing trade agreement, which provided that neither party to the agreement shall make any

4 Painters District Council (Westgate Painting & Decorating Corp.), 186 N.L.R.B. No. 140, 75 L.R.R.M. 1465, 1467 (1970).

5 *Id.*

rule conflicting with the terms of the agreement. Elkins requested that the Union rescind the rule or refrain from taking action to implement it.

In reply Frank Schonfeld, the Union's secretary-treasurer, contended that the rule did not violate any term of the agreement, and therefore refused to accede to Elkins' request. Schonfeld similarly rejected a later request by Elkins that the matter be submitted to the Joint Trade Board[6] for resolution and submission to arbitration if necessary. While Elkins threatened court action, no such action was taken, apparently in the belief that the issue would be settled in the forthcoming negotiations on the new trade agreement.

Negotiations relating to a new agreement commenced in June of 1968. On July 31, the date on which the existing agreement expired, the Union called a strike, which was to last until September 9, the date on which the new contract was executed. During negotiations both sides submitted demands with respect to production quotas.[7] The Association abandoned its demand early in the negotiations, but consistently refused to accept the Union's demand. Unable to reach an accord on this issue, the parties signed the new agreement adhering to the positions they held prior to negotiations—the Association believing that the rule violated the terms of the agreement, the Union believing that the rule did not and that it was a proper means of internal union management.

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6 A board established by the trade agreement between the Union and the Association to hear complaints against either based on violations of the agreement. The board is composed of three members from each party to the agreement.

7 The Union demand was that "[t]he Union shall have the right to establish a maximum standard of production." The Association demand was a proposal to amend Article XXII to read "[d]uring the life of this Trade Agreement neither party to it shall promulgate any rules establishing a standard of production, or continue in force, or make any rules or by-laws conflicting with its provisions." Because the Union demand was not limited to New York Housing Authority Re-paint work, it was broader than the 10-room rule.

As did the old agreement, the new agreement provided for a seven-hour day, five-day work week, with journeymen to be paid by the hour.

After the strike ended, the Union intensified its efforts to enforce the 10-room rule. It threatened to fine those members who did not comply with the rule. Some members, at Union urging, stopped work after painting 10 rooms even though they had not yet worked the full 35 hour week. As a result of the Union's efforts, average production fell below the 11.5 room average.

In response, some employers discharged painters who reduced their output in observance of the rule, or docked employees for time not worked when they left the job after having met the 10-room quota.

Finally, on December 27, 1968, the five Association members and several independents filed section 8(b)(3) charges against the Union with the Board. After extensive hearings, the Trial Examiner recommended dismissal of the complaint as time-barred. The Board, one member dissenting, disregarded this recommendation, holding that the complaint was not time-barred, and that the Union had committed an unfair labor practice.[8]

II. *The Effect of the 10-Room Rule*

It is important to the resolution of the legal issues in this case to understand the effect of the 10-room rule. First, under the trade agreement between the Association and the Union, journeymen painters are required to work five seven-hour days a week. Second, prior to the announcement of the 10-room rule, journeymen painted on average 11.5 rooms per week. Moreover, the evidence reviewed above gives rise to the inference that but for the Union's enforcement of the 10-room rule, journeymen painters

8 *See* Painters District Council (Westgate Painting & Decorating Corp.), 186 N.L.R.B. No. 140, 75 L.R.R.M. 1465 (1970).

would continue to paint on average at least more than 10 rooms per week. It is thus apparent that effective enforcement of the 10-room rule would permit those painters who can paint more than 10 rooms per week to work less than 35 hours a week.

III. *Whether This Complaint Is Time-Barred*

The Union first announced the 10-room rule in March of 1968; the charges giving rise to this complaint were filed in December of 1968, more than six months later. Petitioner thus contends that the complaint is time-barred by section 10(b) of the Act.[9] We disagree.

The substance of the unfair labor practice charged against the Union is that it promulgated and sought to enforce a rule that violates the terms of the collective bargaining agreement between the parties. The 10-room rule is "unfair" only by reference to the terms of the collective bargaining agreement with which it allegedly conflicts. Thus, regardless of whether the announcement of the 10-room rule in March of 1968 constituted an unfair labor practice under the old collective bargaining agreement, a distinct violation occurred in September of 1968 if the 10-room rule conflicts with the terms of the new collective bargaining agreement.[10] In short, even had the parties "agreed" under the old agreement that journeymen would paint 10 and only 10 rooms per week, if the terms of the new agreement are inconsistent with the 10-room rule, then by enforcing the rule the Union committed an unfair labor practice in September of

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9 ". . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . ." Act §10(b), 29 U.S.C. §160(b) (1970).

10 *See Machinists' Local 1424 (Bryan Mfg. Co.)* v. *NLRB*, 362 U.S. 411, 416-17 (1960); *Cone Mills Corp.* v. *NLRB*, 413 F.2d 445, 448-49 (4th Cir. 1969); *International Automobile Workers* v. *NLRB*, 363 F.2d 702, 706-07 (D.C. Cir.), *cert. denied*, 385 U.S. 973 (1966).

1968. If the Union committed a distinct unfair labor practice in September, then the complaint is not time-barred.

IV. *Whether Enforcement of the 10-Room Rule Constitutes An Unfair Labor Practice*

Section 8(b)(3) of the Act provides that it is an unfair labor practice for a labor organization to refuse to bargain collectively with an employer.[11] Section 8(d), in defining the nature of the collective bargaining obligation, provides that:

> . . . where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof . . . ;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

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11 Act §8(b)(3), 29 U.S.C. §158(b)(3) (1970).

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later . . . .[12]

In our opinion the Union's enforcement of the 10-room rule violates the term of the September 9th collective bargaining agreement that stipulates that the standard work week for journeymen painters shall consist of five seven-hour days.[13] By enforcing the rule the Union is in substance modifying this term to stipulate that journeymen are not to work a five day, seven-hour per day work week, but are to work only so long as it takes them to paint 10 rooms. We therefore agree with the Board that before the Union can enforce this modification of the collective bargaining agreement, it must bargain collectively with the Association over the issue. This obligation includes, of course, compliance with the four clauses of section 8(d).

The dissenting board member and the petitioner place heavy reliance upon *Scofield* v. *NLRB*[14] in support of their position. We believe that this reliance is misplaced. *Sco-*

12 *Id.* §8(d), §158(d).

13 *See Associated Home Builders of the Greater East Bay, Inc.* v. *NLRB*, 352 F.2d 745 (9th Cir. 1965). In *Associated* an association of builders claimed that a union's imposition of fines upon its members for exceeding a unilaterally imposed production quota violated the union members' section 7 rights and was therefore a section 8(b)(1)(A) unfair labor practice. The production quota imposed was at a level lower than the average production of the union members. The court found it unnecessary to decide this issue because it considered that the union's action probably constituted a section 8(b)(3) violation. It therefore remanded the case to the Board for further findings on the 8(b)(3) issue. On remand the Board adopted the Trial Examiner's finding that the 8(b)(3) issue was moot because the parties had subsequently executed a collective bargaining agreement that prohibited the imposition of production quotas.

14 394 U.S. 423 (1969).

field involved charges by union members that fines imposed by their union for violation of a production quota violated their section 7 rights and therefore constituted an unfair labor practice. In holding that the imposition of the fines as a means of enforcing the production quota did not constitute an unfair labor practice, the Court was careful to point out that the imposition of the fines in no way violated the terms of the collective bargaining agreement.[15] In *Scofield* the production quota was at a level *above* the production level of the average efficient worker.

We are aware that the National Labor Relations Act does not grant to the Board or to the courts the power to impose substantive contract terms upon the parties to a collective bargaining agreement.[16] But the Board and the courts clearly have the power pursuant to section 8(d) to compel the parties to a collective bargaining agreement to abide by the terms of their agreement, and to amend those terms only through the process of collective bargaining.[17]

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15 "Nor does the union ceiling itself or compliance with it by the union members violate the collective contract. The company and the union have agreed to an incentive pay scale, but they have also established a guaranteed minimum or machine rate considerably below the union ceiling and defined in the contract as the rate of production of an average, efficient worker. The contract therefore leaves in the hands of the employee the option of taking full advantage of his allowances, performing only as an average employee and not reaching even the ceiling rate." 394 U.S. at 433.

16 *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970); *William J. Burns International Detective Agency, Inc.* v. *NLRB*, 441 F.2d 911, 915-16 (2d Cir. 1971), *cert. granted*, 40 U.S.L.W. 3162 (U.S. Oct. 12, 1971).

17 We agree with the dissent that it is not a part of the Board's function to police the enforcement of collective agreements. But, as the Court said in *C & C Plywood*:

> . . . in this case the Board has not construed a labor agreement to determine the extent of the contractual rights which were given the union by the employer. It has not imposed its own view of what the terms and conditions of the labor agreement should be. It has done no more than merely enforce a statutory right which Congress considered necessary to allow labor and management to get on with

If the Union wishes to define the work week of its members in terms of their output rather than in terms of hours, then it can insist on such a provision through the process of collective bargaining.

The petition for review is denied; the cross-petition for enforcement is granted.

HAYS, *Circuit Judge*, dissenting:

I dissent on the ground (1) that the rule promulgated by the union constituted no violation of the collective agreement, (2) that, assuming arguendo that the rule *did* violate the collective agreement, the remedy, a finding that the action of the union constituted an unfair labor practice, is an inappropriate remedy for such a violation, (3) that, if the majority were right in holding that the union's rule violates a provision of the collective agreement (or, indeed, even if the majority is wrong, since the subject was admittedly discussed during negotiations, see *National Labor Relations Board* v. *Jacobs Manufacturing Company*, 196 F.2d 680 (2d Cir. 1952)), the Board's order to the union to bargain, involving as it does a corresponding duty on the

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the process of reaching fair terms and conditions of employment—"to provide a means by which agreement may be reached." The Board's interpretation went only so far as was necessary to determine that the union did not agree to give up these statutory safeguards. Thus, the Board, in necessarily construing a labor agreement to decide this unfair labor practice case, had not exceeded the jurisdiction laid out for it by Congress.

NLRB v. *C & C Plywood Corp.*, 385 U.S. 421, 428 (1967). In *C & C Plywood* the Court held that the NLRB did have jurisdiction to issue a cease and desist order to an employer who neither by custom nor by the terms of the collective bargaining agreement had the power to unilaterally change the wage system. *See NLRB* v. *Strong*, 393 U.S. 357, 360-61 (1969); *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 30, 30 n. 7 (1967); *id.* at 37 (dissenting opinion of Justice Harlan); *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 197-98 (1962); *United Aircraft Corp.* v. *Machinists' Local 700*, 436 F.2d 1, 3-4 (2d Cir. 1970), *cert. denied*, 402 U.S. 908 (1971); *NLRB* v. *M & M Oldsmobile, Inc.*, 377 F.2d 712, 715-16 (2d Cir. 1967).

part of the employer, would be in violation of the terms of Section 8(d). It also seems to me that the majority has incorrectly applied the rule set forth in Local Lodge No. 1424, *International Association of Machinists* v. *NLRB* [*Bryan Mfg. Co.*], 362 U.S. 411 (1960) and that the complaint was barred by the six-month statute of limitations of §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b) (1970).

What the majority actually holds, in effect, is that the union's conduct in promulgating and seeking to enforce its work limitation rule violated the provisions of the collective agreement, specifically the provision stipulating a five day, seven-hour per day work week. However the ordinary and usual wages and hours provisions contained in a collective agreement cannot be magically transformed into provisions specifying the rate of speed at which employees are to work or the amount they are to produce. There was no provision whatever in the agreement requiring the union members to paint 11.5, or for that matter any particular number, of rooms per week. Under *Scofield* v. *NLRB*, 394 U.S. 423 (1969), the union could properly adopt and enforce on its members a rule such as the one here involved. Since the employer had no right under the collective agreement to demand that employees paint any specific number of rooms per day, the union retained the power to act unilaterally with respect to that issue. The employer's recourse was either to discharge those painters who did not paint the number of rooms per day the employer considered satisfactory, or to secure from the union an agreement not to promulgate a work limitation rule.

But, asuming arguendo, that the union did violate the collective agreement by the promulgation and enforcement of its rule, the Board's finding that this violation constituted an unfair labor practice is wholly unjustified. It is not a part of the Board's function to police the enforcement of

collective agreements. See *NLRB* v. *C & C Plywood Co.*, 385 U.S. 421, 427-28 (1967); *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 510-11 (1962). If the union violated the agreement, it would subject itself to an action for breach of contract under Section 301 of the Act, 29 U.S.C. §185. The Board cannot take over enforcement of collective agreements by the device of holding that any violation constitutes a unilateral change in the agreement and therefore the unfair labor practice of refusal to bargain.

Moreover if the union's adoption of the work-limitation rule amounted to a change in the terms and conditions of employment, the Board is prevented by Section 8(d), 29 U.S.C. §158(d) (1970) from ordering the parties to bargain about it. Section 8(d) provides that the duty to bargain collectively "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." The Board's order requiring the union and, therefore, the employer, to bargain is inconsistent with the determination that the promulgation of the rule changed a term or condition of employment contained in the collective bargaining agreement. The Board, in effect, holds that the union has refused to bargain concerning a term over which the union and the employer have already bargained and which they have included in the contract, and about which, under §8(d), they not only have no duty to bargain further but they have no *right* to bargain. This inconsistency is itself sufficient ground for denying the Board's cross-petition for enforcement.

In addition I would hold the complaint barred by the six-month statute of limitations provision of Section 10(b).

The union promulgated the work limitation rule on March 5, 1968. Charges that the rule violated §8(b)(3)

were not filed until December 27, 1968, almost eight months after promulgation. The only conduct alleged to violate §8(b)(3) that occurred during the six-month period preceding the filing of charges was the alleged union effort to *enforce* the previously adopted rule. *Bryan* established that charges can be filed and a complaint issued against such enforcement efforts as those involved in the instant case only if charges could still be filed against the act of adopting the rule being enforced. The Court in *Bryan* rejected the Board's argument that the *enforcement* of a union security clause within the statutory period could be the basis of a timely complaint, even though the original *execution* of the agreement containing the clause occurred more than six months prior to the filing of charges. 362 U.S. at 415. The Court pointed out that "the Board's position would mean that the statute of limitations would never run in a case of this kind." *Id.* at 416. In the instant case, the work limitation rule was "perfectly lawful on the face of things," and was held to be unlawful only on the ground that it was said to conflict with a provision of the original and of the second agreement. To paraphrase the Supreme Court's language in *Bryan,* if an unfair labor practice can be established only by reference to the promulgation of the rule, a time-barred event, the policies underlying §10(b) would be vitiated by allowing a complaint to be issued against the union's attempt to enforce that rule. *Id.* at 419. The union's effort to enforce the work limitation rule is "a *suable* unfair labor practice only for six months following the" promulgation of the rule. *Id.* at 423.

The majority reasons that, "regardless of whether the announcement of the 10-room rule in March of 1968 constituted an unfair labor practice under the old collective bargaining agreement, a distinct violation occurred in September of 1968 if the 10-room rule conflicts with the terms of the new collective bargaining agreement." However

where the enforcement of a rule is involved *Bryan* rejected the "continuing violation" theory. The majority's reliance on the "distinct act" cases is misplaced. In those cases the acts constituting unfair labor practices were qualitatively different, *NLRB* v. *Local 210, International Brotherhood of Teamsters*, 330 F.2d 46 (2d Cir. 1964), or were repeated instances of specific acts which in and of themselves constituted unfair labor practices, *compare NLRB* v. *Electric Furnace Co.*, 327 F.2d 373, 376 (6th Cir. 1964) and *American Federation of Grain Millers* v. *NLRB*, 197 F.2d 451 (5th Cir. 1952) *with Cone Mills Corp.* v. *NLRB*, 413 F.2d 445, 448 (4th Cir. 1969); *Melville Confections, Inc.* v. *NLRB*, 327 F.2d 689 (7th Cir.), *cert. denied*, 377 U.S. 933 (1964); *NLRB* v. *White Const. & Eng'r Co.*, 204 F.2d 950 (5th Cir. 1953); *UAW* v. *NLRB*, 363 F.2d 702 (D.C. Cir.), *cert. denied*, 385 U.S. 973 (1966). In *Bryan* the Court explicitly rejected the contention that the execution of a new agreement and the attempt to enforce a previously promulgated rule constituted a new unfair labor practice for purposes of §10(b).

> "It is apparently not disputed that the Board's position would withdraw virtually all limitations protection from collective bargaining agreements attacked on the ground asserted here. For, once the principle on which the decision below rests is accepted, so long as the contract—*or any renewal thereof*—is still in effect, the six-month period does not even begin to run."

362 U.S. at 425 (emphasis added). See *NLRB* v. *Lundy Mfg. Corp.*, 286 F.2d 424 (2d Cir. 1960).

For these reasons it appears that neither the promulgation nor the enforcement of the union's work limitation rule violated §8(b)(3). I would grant the application to set aside the order of the Board and deny the cross-petition for enforcement.

186 NLRB No. 140

Appendix B

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL--CIO, DISTRICT COUNCIL NO. 9 OF NEW YORK CITY

and Case 2--CB--4704

WESTGATE PAINTING AND DECORATING CORP., DYNAMIC PAINTING & DECORATING CORP., D.C. DECORATING CORP., MAX EPSTEIN & COMPANY, INC., WELDON PAINTING CO., INC., UNITED PAINTING COMPANY, INC., THE HUDSON MAINTENANCE CORP., AHERNE'S PAINTING CONTRACTORS, INC.

and

THE ASSOCIATION OF MASTER PAINTERS AND DECORATORS OF THE CITY OF NEW YORK, INC.

Party in Interest

DECISION AND ORDER

On August 28, 1969, Trial Examiner Herbert Silberman issued his Decision in the above-entitled proceeding, finding that Respondent had not

engaged in any of the alleged unfair labor practices and recommending that the complaint be dismissed, as set forth in the attached Trial Examiner's Decision. Thereafter, the Charging Parties and the General Counsel filed exceptions to the Trial Examiner's Decision and supporting briefs; Respondent filed an answering brief in opposition to exceptions and in support of the Trial Examiner's Decision.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and the briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith.

The facts show that on March 5, 1968, at a special meeting called to discuss and act on problems connected with New York City Housing Authority repaint work, the Union adopted a resolution that no journeyman member employed in City Housing repaint work should paint more than 10 rooms per week effective April 1, 1968. Prior thereto, overall production averaged 11.5 rooms per man for a 35-hour workweek. Within a few days thereafter, the Union notified all contracting employers, including the Charging Parties, of the 10-room rule. The notice stated that the rule was adopted "to eliminate abuses which have

undermined standards of workmanship, caused cheating of the Insurance Fund and in general, were responsible for unfair competition." The members of the Union were advised of the 10-room rule, as well as the penalties for failure to abide by the rule, at membership meetings and through the Union's newspaper. The Union sought to enforce the rule by requiring members to carry cards setting forth the rule and penalties, and union stewards to submit daily reports on production.

On March 13, 1968, after having received protests from association members about the rule, Louis Elkins, secretary of the Association, informed the Union by letter that the rule was contrary to the long-established trade principle that the Union shall not restrict the amount of work a man may perform, and that it constituted a violation of article XXII of the existing trade agreement, which provided that neither party "shall continue in force or make any rule or by-law conflicting with its provisions." The letter requested the Union to rescind the rule or refrain from taking any action to implement it. On March 18, 1968, Frank Schonfeld, the Union's secretary-treasurer, replied that the rule did not violate article XXII, and stated that the employers unilaterally established excessive minimum quotas on this type of work, resulting in conditions detrimental to the health, safety, and work opportunities of its membership which called for emergency action.

On March 21, 1968, Elkins suggested to Schonfeld that the Union's alleged violation of the trade agreement be submitted to the Joint Trade Board for decision and submission to arbitration if necessary. Schonfeld denied that the Union had violated the agreement and stated that the matter therefore was not arbitrable. Elkins rejoined that the Association could bring court action to compel arbitration of the dispute. However, as the time to commence negotiations for a new agreement was approaching, Elkins told the association members who complained about the production slowdown that "we weren't going to rock the boat," and that he was making every effort to commence negotiations early.

Negotiations commenced in June, and on July 31, 1968, the date on which the existing collective-bargaining agreement expired, the Union called a strike which began August 1 and continued until a new contract was executed on September 9, 1968. Negotiations continued during the strike.

Among the Union's bargaining demands was the following: "The Union shall have the right to establish a maximum standard of production." The Association's counterproposals included the following: "Article XXII . . . Change to Read: During the life of this Trade Agreement neither party to it shall promulgate any rules establishing a standard of production, or continue in force, or make any rules or by-laws conflicting with its provisions." The

Association abandoned its demand early in the negotiations and rejected the Union's demand.

Production quotas were discussed for the last time at the September 3 meeting, during which the major differences between the parties were resolved. While there is considerable conflict in the testimony concerning the production quota problem, we find, in agreement with the Trial Examiner, that the parties were unable to reach any agreement concerning it. The parties executed a new contract on September 9, and the strike was terminated. The new contract, which is effective from September 9, 1968, through July 31, 1971, contains no reference to the Union's work limitation rule and no change in article XXII, except that it was remembered as article XXIII.

After September 9, and within the 10(b) period, the Union intensified its efforts to enforce the 10-room rule, which included threats to fine members who violated the rule. The Association and the employers continued to oppose the Union's action. Certain employers testified that occasionally they discharged painters who reduced their output in observance of the rule, and on several occasions docked employees for time not worked when the employees left the job after having completed the 10-room quota.

The charge herein was filed on December 27, 1968, and the complaint issued on March 6, 1969. The complaint,

as amended,[1] alleges in substance that since September 9, 1968, Respondent Union has unilaterally promulgated a maximum production quota of 10 rooms per week per man to all painters in the contractual bargaining units and has instructed and directed these employees to refrain from painting in excess of 10 rooms per week, subject to intraunion charges and penalties for violations of the rule; that neither the Association nor any of the employers involved has consented to, or approved, the rule; and that the Union has thereby violated Section 8(b)(3) of the Act.

The Trial Examiner found that the Union promulgated its maximum production quota of 10 rooms per week per man and began to apply it in March 1968; the charge in this proceeding was not filed until December, more than 6 months later; if there was an obligation on the part of the Union to bargain about the 10-room rule, such obligation matured in early March 1968; hence, this proceeding is barred by Section 10(b) of the National Labor Relations

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1/ The complaint was amended on April 7, 1969, by removing the name "Commodore Painting Co., Inc." as a Charging Party, pursuant to its request that it be considered as withdrawn from the proceedings.

Act,[2] as amended.

In finding that this proceeding was barred by Section 10(b) of the Act, the Trial Examiner relied on the Supreme Court's decision in Scofield[3], that enforcement of a work limitation rule is not per se a violation of the Act, and the Supreme Court's ruling in Bryan[4], that an unfair labor practice occurring outside the 10(b) period cannot be carried forward as a continuing violation for more than 6 months. In the Bryan case, however, the Court also ruled that where events within the 10(b) period are themselves unfair labor practices, the earlier events may be utilized to shed light on the true character of matters occurring within the 10(b) period. The primary issue in the present proceeding is whether the Union's actions

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2/ Section 10(b) provides in pertinent part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.

3/ Scofield v. N.L.R.B., 394 U.S. 423.

4/ Local Lodge No. 1424, International Association of Machinists (Bryan Manufacturing Co.) v. N.L.R.B., 362 U.S. 411.

within the 10(b) period themselves constituted a violation of Section 8(b)(3) of the Act. Hence, a finding that the events which occurred within the 10(b) period constituted an unfair labor practice apart from the events which occurred prior thereto would render Section 10(b) inapplicable. For the reasons set forth below, we find that Section 10(b) is not applicable under the circumstances in this case.

In Associated Home Builders, 5/

5/ Associated Home Builders of the Greater East Bay, Inc. v. N.L.R.B., 352 F. 2d 745 (C.A. 9). In its decision (145 NLRB 1775), the Board had found no 8(b)(1)(A) violation in the union's establishment of production ceilings and imposition of fines on its members for violating them. The Board had found, however, that the union violated Section 8(b)(1)(A) by applying dues payments made under a union-shop contract against fines imposed upon members. On remand from the Court, the Board, in absence of exceptions, adopted the Trial Examiner's finding that the 8(b)(3) issue was moot as the parties had subsequently executed a collective bargaining agreement containing a provision that no quantity restrictions would be placed on employees.

the U.S. Court of Appeals for the Ninth Circuit found, in similar circumstances, that union rules on production were unilaterally adopted for the purpose of establishing "terms and conditions of employment" of union members, and that even though an 8(b)(3) violation was neither alleged nor litigated, the propriety of the union's conduct should have been adjudicated by the Board under Section 8(b)(3). Accordingly, the Court remanded the case to the Board with instructions to consider the issue of the union's failure to bargain collectively with the employers before initiating its production limitations. Thus, the key issue presented by the evidence in the present case is whether the Union, by implementing its 10-room rule within the 10(b) period, unilaterally changed "a term or condition of employment" 6/ without acquiescence by the Employers.

6/ Cf. Scofield, supra, and Associated Musicians of Greater New York, Local 802, AFM, 134 NLRB 23, which are distinguishable on their facts. Thus, in Scofield there was no 8(b)(3) charge and the Supreme Court found that the employer had virtually acquiesced and cooperated in the application and implementation of the rule. In Associated Musicians, the union bylaw could not effectively change wages, whereas here the union rule did in fact change the amount of work performed.

The record shows that prior to the imposition of the 10-room rule, there were no fixed production quotas. The employees were paid on a salary, not a piecework basis. Average production was 11 to 11.5 rooms per man for a 7-hour day, 35-hour workweek. No change in these terms of employment was made by the parties in negotiating a new contract. Nevertheless, after the new contract was executed, the Union continued to implement its 10-room rule and did in fact succeed in unilaterally effecting changes in terms and conditions of employment. There is evidence in the record of instances of successful reduction in the quantity of production from an average of 11.5 rooms per week per man to an average of 10 rooms, and further, of employees, pursuant to union urging, stopping work after completing 10 rooms, even though they had worked less than the 7-hour day or 35-hour week provided for by the collective-bargaining agreement. As the employees were paid on a salary basis, the Union's action in these instances effected changes both in the wages paid employees and in the workweek.

In these circumstances, the Union unilaterally effected changes in wages and the workweek which were neither sanctioned by the contract nor accepted by the Employers. The Union

by its action after the new agreement was executed, thus sought to secure without bargaining what it had failed to achieve in bargaining. Therefore, the Union's unilateral implementation of its 10-room rule constituted a change in terms and conditions of employment sufficient to preclude the continued imposition of the rule without the agreement of the Employers.

Accordingly, we find, under the circumstances set forth above and upon the entire record, that the Union, by unilaterally enforcing its 10-room maximum production quota on and after September 9, 1968, violated Section 8(b)(3) of the Act. 7/

The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth above, occurring in connection with its operations described in section I of the Trial Examiner's Decision, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to

7/ We find it unnecessary to consider whether the Union's enforcement of the rule prior to September 9, 1968, violated the Act.

lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices prohibited by Section 8(b)(3) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

We have found that Respondent, as representative of the employees of the Charging Parties in the appropriate bargaining units, has unlawfully failed and refused to bargain by unilaterally enforcing its 10-room maximum production quota against unit employees performing work on New York City Housing Authority projects without bargaining with the Charging Parties relative thereto. We shall therefore order that Respondent cease and desist therefrom, and shall require Respondent to bargain, upon request, with the Charging Parties prior to the enforcement of any production quota against unit employees normally performing such work.

Conclusions of Law

1. The Respondent is a labor

organization within the meaning of Sections 2(5) and 8(b) of the Act.

2. The Charging Parties are employers within the meaning of Sections 2(2) and 8(b)(3) of the Act, and are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3.(a) All journeymen painters, paperhangers and apprentices employed by the employer-members of The Association of Master Painters and Decorators of the City of New York, Inc., constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

(b) All journeymen painters, paperhangers, and apprentices employed by Westgate Painting and Decorating Corp. constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

(c) All journeymen paperhangers, and apprentices employed by Dynamic Painting & Decorating Corp. constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

(d) All journeymen painters, paperhangers, and apprentices employed

by The Hudson Maintenance Corp. constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Respondent labor organization is, and at all times material herein has been, the exclusive representative of the employees in the above appropriate units for purposes of collective bargaining, within the meaning of Section 9(a) of the Act.

5. By failing and refusing to bargain collectively with the Charging Parties, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Brotherhood of Painters, Decorators and Paperhangers of America, AFL--CIO, District Council No. 9 of New York City, its officers, agents, and representatives,

shall:

1. Cease and desist from enforcing, unilaterally and without notice to or consultation with the above-named Employers, any production quota against employees in the appropriate bargaining units performing work on New York City Housing Authority projects.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively in good faith with above-named Employers prior to the enforcement of any production quota against employees in the appropriate bargaining units performing the above work.

(b) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."[8]

8/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members of Respondent are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 2, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C.
November 30, 1970

Edward B. Miller, Chairman

Gerald A. Brown Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER FANNING, dissenting:

For many years Respondent Union has bargained with the Association for painters employed by members of the Association. In contemplation of the expiration of their then current agreement in July 1968, the parties began negotiations for a new contract in June of that year. The Union struck on August 1 and continued its strike until a contract was signed on September 9, 1968. Bargaining continued during the strike. Among other issues, the parties bargained with respect to the imposition of a production ceiling on the number of rooms to be painted per week by members of the Union. The Union sought to include in the contract a specific provision giving it the right to establish a maximum standard of production. The Association countered by seeking a specific clause forbidding either party to establish such a standard. Neither the Union nor the Association was successful in achieving its objective and the contract, as finally executed, is silent as to this issue. As far back as March 1960, the Union with the knowledge, but not the acquiescence of the Employers, had established an intraunion rule requiring its members to limit their production to 10 rooms per week on all painting work performed for the New York City

Housing Authority. The rule was continued in effect after September 9, 1962. The majority does not pass upon the Union's enforcement of its production rule prior to this date, but holds that its subsequent enforcement of the rule is violative of Section 8(b)(3), apparently on the ground that the Union's unsuccessful attempt to secure a contractual right for its journeyman standard of production converted that standard into an unlawful refusal to bargain.

The record shows that the Union's attempt to secure by union rule or contract a production standard of 10 rooms per week per man was part of a program to rectify an 8-year history of corruption, abuse of employee rights, and shoddy workmanship in repaint work performed for the New York City Housing Authority. Shortly before the election of Frank Schonfeld as secretary-treasurer of the Respondent Union in September 1967, a New York County Grand Jury handed down indictments alleging that Schonfeld's predecessor, Martin Barbach, several officials of the New York Housing Authority, and a dozen painting contractors had engaged in a conspiracy to discriminate in favor of certain contractors with respect to the enforcement of union rules and contractual conditions in painting work performed for the Housing Authority. The

primary victims of this conspiracy were union members, who were compelled to work long hours, for less pay, and under speedup conditions, all in violation of their collective-bargaining agreement. In addition, the tenants of the Authority were forced to accept inferior paint and inferior workmanship. Schonfeld testified that the International Union appointed a trustee to take over the affairs of the Respondent District Council. To the consternation of the members, however, Rarback was appointed to a lucrative position as head of the Council's organizing and education department. Pursuant to an order of Federal District Judge Marvin Frankel, the trusteeship was terminated and an election, conducted under the auspices of the court, resulted in Schonfeld's election by the members of Respondent Union. The latter thereupon took steps, including in March 1969 the unanimous adoption of the 10-room rule, to correct the illegal and unfavorable conditions under which its members had been employed in Housing Authority work. The members were assured that they would have the full protection of their union in the future and that union contractual conditions of employment would be required of all contractors without discrimination. With respect to the reasonableness of the 10-rrom rule, union officials testified that a union

painter could not be expected to prepare, spackle, spread drop cloths, move furniture, and paint more than 2 rooms per 7-hour day in a journeyman manner under the union contract. Halls, closets, and bathrooms were not counted as separate rooms.

I believe the majority's finding of a violation of Section 8(b)(3) in this case represents a substantial change in the direction of the law of labor relations and is a matter of the gravest consequence. Historically, unions have attempted to improve the working conditions of their members either by restricting the conditions under which their members offer themselves for employment to any employer, with or without a contract, or by securing favorable terms and conditions through the processes of collective bargaining. The 40-hour week, minimum wage rates, restrictions on overtime, job referral systems are a few examples of union rules and bylaws ultimately incorporated in collective-bargaining agreements or statutory law.[9]

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[9] Associated Musicians of Greater New York, Local 802, 164 NLRB 23, 26 citing N.L.R.B. v. Furriers Joint Council of New York, 224 F.2d 78, 80 (C.A. 2).

The question whether conduct by a union, analogously to employer conduct, can be treated as unilaterally establishing working conditions was left open by the Supreme Court in N.L.R.B. v. Insurance Agents' International Union (Prudential Ins. Co.), 361 U.S. 477, 497 (February 1960). There the Court held that a union's tactics in the nature of "sit-downs" and "slow-downs," clearly affecting the conditions under which its members were employed, did not constitute a violation of Section 8(b)(3). Nor, the Court held, did the circumstance that the employees' conduct was unprotected or deserving of moral condemnation impinge upon the union's willingness to engage in good-faith collective bargaining, as required by the statute. In N.L.R.B. v. Katz d/b/a Williamsburg Steel Products Co., 369 U.S. 736 (May 1962), the Court, distinguishing Prudential Insurance, provided the Board with an appropriate test to determine the legality of unilateral conduct by parties involved in collective bargaining. Unilateral conduct by an employer without prior discussion with the union, the Court held, constituted a refusal to negotiate and was an obstruction to bargaining, contrary to congressional policy. In Prudential on the other hand, the Court pointed out, the union took no action "unilateral or otherwise" to foreclose discussion of any issue. The gravemen of unlawful

unilateral conduct was found by the Court to consist in "behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement." N.L.R.B. v. Katz, supra, 747

The most recent and authoritative discussion of the legality of union rules adopted to restrict the production of union members on the job is to be found in the decision of the Supreme Court in Scofield v. N.L.R.B., 394 U.S. 423 (April 1969). With due respect for the dicta of the Court of Appeals for the Ninth Circuit in Associated Home Builders v. N.L.R.B., 352 F.2d 745 (C.A. 9, October 1965), upon which the majority relies, the later decision of the Supreme Court in Scofield must be given precedence over the view of the Circuit Court of the Ninth Circuit in this area of labor law. Unquestionably, the production standard of 10 rooms per man per week sought to be established by the Respondent Union in this case affected, as in Scofield, all three participants in the labor-management relation: employer, employee, and union. As in Scofield, although the rule was an internal union matter, it was obviously intended to have an impact beyond the confines of union

organization. Such an impact, however, upon existing conditions of employment was held by the Supreme Court in Scofield to be insufficient in and of itself to warrant the conclusion that the Union's conduct in enforcing a production ceiling was violative of Section 8(b)(1)(A). In that case the complaint did not allege a violation of Section 8(b)(3) and, although the issue was fully litigated, no such violation was found or intimated. Indeed, the Court did not confine its discussion to the narrow context of restraint and coercion of employees, but, expanding upon its rationale in Katz, supra, in the refusal-to-bargain area, exonerated the union in Scofield from conduct violative of Section 8(b)(1)(A) because the enforcement of its production standard did not obstruct, impede, or otherwise impair the collective-bargaining process.

Significantly, in 1969 the Court in Scofield did not, as it had in the Katz decision of 1962, make reference to the comment of the 1960 Prudential Insurance opinion that unilateral conduct of a union in attempting to establish working conditions, analogously to employer unlawful unilateral conduct, was an open question. Further, it must be noted that the Court had made a point in Prudential Insurance of distinguishing between attempts by the union to

establish permanent conditions of employment and mere harassing tactics to achieve its bargaining aims, as in the Prudential case. Clearly, in Scofield the union was engaged in a campaign to achieve a permanent improvement in working conditions for its members.

In my opinion, the legality of the Union's conduct in the instant case, whether considered in violation of Section 8(b)(3) or 8(b)(1)(A), whether unilateral or not, rests squarely upon the criteria for finding such conduct unlawful enunciated by the Supreme Court in the Scofield decision. In that case the Court first expressed concern with the question of the legitimacy of the union's interest in curbing an unlimited production system. If found that unions historically had been opposed to such systems and that they were justifiably fearful that competitive pressures would endanger worker's health, foment jealousies, and reduce the work force. Having found the union's interest a legitimate one, the Court turned to the next critical question, whether the production ceiling sought to be imposed by the union on its members could be shown to have impaired a statutory labor policy. It answered this question in the negative and succinctly stated its conclusions as follows:

> The union rule here left the collective bargaining process unimpaired, breached no collective contract, required no pay for unperformed services, induced no

discrimination by the employer against any class of employees, and represents no dereliction by the union of its duty of fair representation. In the light of this, and the acceptable manner in which the rule was enforced, vindicating a legitimate union interest, it is impossible to say that it contravened any policy of the Act. [Scofield v. N.L.R.B., supra, 436.]

I believe the complaint in the instant case should be dismissed on the authority of Scofield. In view of the evidence cited above and in the Trial Examiner's Decision, the legitimacy of the Union's interest in restoring legality and order to a portion of the painting industry in the New York City area can hardly be questioned. The Union did not attempt to enforce its production rule by means of violence, threats against employers, or other unreasonable means. Indeed, there is no evidence that any member was ever fined for violation of the rule. Far from impeding the collective-bargaining process, it was at the Union's insistence that the parties fully considered and discussed the incorporation of the rule in the collective agreement signed on September 9. The General Counsel has not alleged and the evidence certainly does not show that the parties bargained as to this issue other than in good faith.

The majority asserts that the Union "effected changes" which were "neither sanctioned by the contract nor accepted by the Employers." But the

power to effect a change in a condition of employment did not rest with Respondent Union. At all times the Employers had complete authority to discharge or otherwise discipline any employee, who failed to adhere to the Employer's own unilateral production standard. The record shows that some Employers did, in fact, exercise such authority when some employees refused to work a full 7 hours per day. No grievances were filed by the Union in any of these cases, as the Union took the position that its 10-room rule was designed to provide better, not less, work.

I have serious doubts that union rules restricting the production of its members may properly be considered a "unilateral change" in a condition of employment violative of Section 8(b)(3) because I have difficulty understanding how such a change can be effected without the acquiescence of the employer. However, I do not believe that this is a matter of substance in view of the Supreme Court's holding that this type of union conduct is governed by the provisions of Section 8(b)(1)(A). But assuming, arguendo, for purposes of the instant case, that a union may, indeed, accomplish a change in a condition of employment unilaterally, I assume further that the standard of legality applicable to employers would be equally applicable to unions in an allegation of an unlawful refusal to bargain. In Katz, as noted above, the Supreme Court did not hold that all unilateral conduct by an employer violated Section 8(a)(5). It specifically

held that unilateral conduct "without prior discussion with the union" was a "refusal to negotiate," and "obstruction to collective bargaining," and "contrary to Congressional policy." It is not the unilateral nature of the conduct which makes it a violation of Section 8(a)(5), but the lack of discussion, the lack of bargaining. If, after good-faith bargaining to an impasse, the employer in Katz insisted on implementing a unilateral change, its obligation with respect to Section 8(a)(5) would have been fulfilled. The fact that the change was neither sanctioned by a contract nor accepted by the union would not be sufficient to establish a violation of this section of the Act. Of course, the union could take lawful countermeasures in response to the employer's unilateral action, but the action itself would not have obstructed the collective-bargaining process. Applying these principles to the alleged unilateral action of the Union in this case, it is clear that the Union, certainly as of September 9, 1968, had engaged in substantial good-faith bargaining with the objective of incorporating in the contract the established union rule requiring members to paint no more than 10 rooms per week. With respect to this issue, the conduct of the Union after September 9 did not differ from its conduct prior to that date. In bargaining the Employers had been unsuccessful in their demand that the Union rescind its rule. The Board has held that an employer does not violate Section 8(a)(5) by unilaterally subcontracting unit work where it had

theretofore engaged in that practice and the union during contract negotiations was unsuccessful in its demand that the employer retreat from this position. Shell Oil Company, 149 NLRB 283. By parallel reasoning, whatever unilateral conduct the Respondent Union undertook in this case, such conduct after September 9 was not violative of Section 8(b)(3).

The above analogy is not intended to exonerate or even to suggest that union conduct of this type should be totally exonerated from the proscription of the statute. It is, however, illustrative of the difficulty encountered when comparing the enforcement of union rules on union members to unilateral action taken by an employer without prior discussion with the union representing its employees. Scofield makes it abundantly clear that unions are not free under this Act to make and enforce such rules by threats and fines without regard to statutory policy. The legitimate interest of unions in protecting their members and improving their conditions of employment must be balanced by the statute's encouragement of collective bargaining and its prohibition against the restraint and coercion of employees. I have considered the Respondent Union's conduct in the instant case in the light of these criteria, set forth more specifically in the Scofield decision, and I must conclude on the basis of that precedent that Respondent Union has not violated any provision of this statute.

For these reasons I dissent.

Dated, Washington, D.C.
November 30, 1970

John J. Fanning, Member
NATIONAL LABOR RELATIONS
BOARD

(SEAL)

APPENDIX App-B

NOTICE

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

To All Members Of Brotherhood of Painters, District Council No. 9 Of New York City

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT enforce our 10-room maximum production quota against the employees in the bargaining units described below working on New York City Housing Authority projects without bargaining with Westgate Painting and Decorating Corp.; Dynamic Painting & Decorating Corp.' D. C. Decorating Corp.; Max Epstein & Company, Inc.; Weldon Painting Co., Inc.; The Hudson Maintenance Corp.; Aherne's Painting Contractors, Inc.; and The Association of Master Painters and Decorators of the City of New York, Inc.

WE WILL, upon request, bargain in good faith with the above-named

Employers prior to the enforcement of any production quota against the employees in the bargaining units described below.

The bargaining units are:

All journeymen painters, paperhangers and apprentices employed by (1) the employer-members of The Association of Master Painters and Decorators of the City of New York, Inc.; (2) Westgate Painting and Decorating Corp.; (3) Dynamic Painting & Decorating Corp.; and (4) The Hudson Maintenance Corp.

BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL--CIO, DISTRICT COUNCIL NO. 9 OF NEW YORK CITY

(Labor Organization)

Dated_____ By_____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions

may be directed to the Board's Office, 35th Floor, Federal Building, 26 Federal Plaza, New York, New York 10007, Telephone 212--264--0300.

Appendix C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AFL--CIO, DISTRICT COUNCIL NO. 9 OF NEW YORK CITY

and Case 2--CB--4704

WESTGATE PAINTING AND DECORATING CORP., DYNAMIC PAINTING & DECORATING CORP., D.C. DECORATING CORP., MAX EPSTEIN & COMPANY, INC., WELDON PAINTING CO., INC., UNITED PAINTING COMPANY, INC., THE HUDSON MAINTENANCE CORP., AHERNE'S PAINTING CONTRACTORS, INC.

and

THE ASSOCIATION OF MASTER PAINTERS AND DECORATORS OF THE CITY OF NEW YORK, INC.

Party in Interest

Milton Pravitz, Esq., for the General Counsel.

Henry J. Easton, Esq. (Messrs. Easton & Echtman), of New York, N.Y., for the Respondent.

Jeremiah B. McKenna, Esq. (Messrs. Carro, Spanbock & Londin), of New York, N.Y., for the Charging Parties.

Harold J. Raby, Esq. (Messrs. French, Fink, Markle & McCallion), of New York, N.Y., for the Party in Interest.

TRIAL EXAMINER'S DECISION

Statement of the Case

HERBERT SILBERMAN, Trial Examiner: Upon a charge filed on December 27, 1968, a complaint, dated March 6, 1969, was issued alleging that the Respondent, Brotherhood of Painters, Decorators and Paperhangers of America, AFL--CIO, District Council No. 9 of New York City, herein sometimes called the Union, has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Sections 8(b)(3) and 2(6) and (7) of the Act. The Respondent filed an answer denying that it had engaged in any violations of the Act. A hearing in this proceeding was held in New York, New York, on various days between April 21 and June 11, 1969. Thereafter, briefs were filed on behalf of the General Counsel, the Charging Party, and the Party

in Interest which have been carefully considered.1/

Upon the entire record in this case, I make the following:

Findings of Fact

I. Jurisdictional Findings

The complaint alleges, and the answer does not deny, and I find that the Respondent is, and during all times material hereto was, a labor organization within the meaning of Section 2(5) of the Act. The allegations of the complaint relating to the corporate status of the Charging Parties, the volume and nature of their businesses and the membership of some of them in the Association of Master Painters and Decorators of the City of New York, Inc., herein called the Association, a membership corporation organized and existing under the laws of the State of New York, which performs the function of negotiating and administering collective-barganing agreements on behalf of its members with Respondent, were not contested at the hearing by Respondent and were proved by General Counsel. Accordingly, as alleged in the complaint, I find that

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1/ No opposition having been filed to General Counsel's motion, dated July 6, 1969, to correct the (continued)

each of the Charging Parties during all times material hereto has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Issues

The Charging Parties are paint contractors. During the times relevant hereto individually they performed work, awarded on the basis of competitive bids, at projects operated by the New York City Housing Authority, a public housing corporation.

For many years the Charging Parties have had contractual relationships with the Respondent covering appropriate units of journeymen painters, paperhangers, and apprentices. D.C. Decorating Corp., Max Epstein & Company, Inc., Weldon Painting Co., Inc., United Painting Company, Inc., and Aherne's Painting Contractors, Inc., during the times material hereto, have been members of the Association and their employees have been included in an associationwide collective-bargaining unit. The employees of Westgate Painting

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1/ transcript of record, said motion is hereby granted.

and Decorating Corp., Dynamic Painting & Decorating Corp., and The Hudson Maintenance Corp. have constituted separately appropriate units. The historical bargaining practice has been for the Respondent and the Association to negotiate a contract and, thereafter, for the other employers who are not members of the Association to enter into substantially identical agreements with the Respondent.

The complaint, as amended, alleges: On July 31, 1968, the then subsisting collective-bargaining agreements terminated. Negotiations for renewal of their contract were conducted by the Association and the Respondent between June and September 1968.. During the negotiations Respondent sought a provision "permitting it to establish maximum production quotas for all painting work including the permission to establish a maximum production quota of ten rooms per week per man on New York City Housing Authority projects." The Association rejected and refused to incorporate such proposal into the contract. About September 9, 1968, Respondent entered into a collective-bargaining agreement with the Association and similar individual agreements with the other Charging Parties who were not members of the Association. These contracts contain no provision permitting, sanctioning, or authorizing Respondent

to establish maximum production quotas for any of the employees covered thereby. Nevertheless, since on or about September 9, 1968, Respondent has unilaterally promulgated a maximum production quota of 10 rooms per week per man to all painters who are employed on New York City Housing Authority projects, including employees of the Charging Parties, and has urged, instructed, and directed such employees to refrain from painting in excess of 10 rooms per week per man on New York City Housing Authority projects; and since on or about September 9, 1968, Respondent has informed, warned, and otherwise instructed such employees that they would be subject to intraunion charges and penalties if they failed to adhere to the 10 rooms per week per man maximum production quota for New York City Housing Authority projects. Neither the Association nor any of the employers named as Charging Parties herein has consented to or approved such quotas. Finally, the complaint alleges that Respondent has violated Section 8(b)(3) of the Act by unilaterally promulgating a maximum production quota for its members who are doing New York City Authority work and by seeking to maintain and enforce such quota against its members.

Respondent, in its answer, as amended, in addition to denying that it has violated the Act, alleges as an affirmative defense that on or about

March 5, 1968, it adopted a resolution applicable to its members employed in New York City Housing repaint work that no journeyman member should paint more than 10 rooms per week effective April 1, 1968; that notice thereof was given to all the Charging Parties; and that more than 6 months had elapsed between the promulgation and application of said rule and the date upon which the charges herein were filed. Thus, Respondent alleges that this proceeding is barred by reason of Section 10(b) of the Act.2/

2/ Respondent, in its answer, in addition to denying certain of the factual averments of the complaint sets forth conflicting allegations. For instance, with respect to the averment of the complaint that the Association rejected and refused to incorporate into the contract a provision permitting the Union to establish maximum production quotas for all painting work, the answer alleges that "the Association refused to discuss incorporating into the written contract, then being negotiated, an express provision giving Respondent the right to establish a maximum standard of production, and the Association expressly waived its right to negotiate the same." With respect to the allegation in the complaint that the contract contains no provision authorizing Respondent to establish any maximum (continued)

III. Sequence of Events

The Union contends that the 10 rooms per week quota which it sought to impose was not a slowdown nor a work stretchout device but was adopted as an instrument to cure abuses which had arisen in the segment of the industry which does painting on a contractual basis for the New York City Housing Authority. The Union's position was described at the hearing by Frank Schonfeld, secretary-treasurer and principal executive officer of the Union. Schonfeld testified that he was elected to office on September 17, 1967, and

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2/ production quotas, the answer alleges that the contract was subject to Respondent's existing rules and regulations affecting its members, of which the Association then had knowledge, and that such rules and regulations included a union rule that on New York City repaint work no journeymen shall paint more than 10 rooms per week. Finally, the answer alleges that the Association informed the Respondent that the latter's rule regarding a maximum production quota would be effective, if it were legal, without being specifically included in their collective-bargaining agreement.

assumed the position to which he was elected on the 20th of that month. According to Schonfeld, shortly before his election, the New York County Grand Jury handed down an indictment alleging that an unlawful conspiracy had existed among Schonfeld's predecessor in office, several officials of the New York City Housing Authority and more than a dozen painting contractors who regularly did work for the New York City Housing Authority. Pursuant to the alleged conspiracy, which extended over a period of approximately 8 years, the Union did not enforce the trade rules of the collective-bargaining agreements with the employers in the paint industry in an evenhanded manner. There were favored contractors whose violations of the trade rules were overlooked while the trade rules were vigorously enforced against other paint contractors. In further pursuance of the alleged conspiracy officials of the Housing Authority, in addition to providing these same favored contractors with privileged information, were lax in the inspection of the work done by them so these contractors were able to perform and get paid for work which did not meet and comply with specifications. The conspiracy operated in such a manner that although substantial sums of money were passed as bribes the painting costs of the New York City Housing

Authority did not increase. The principal victims of the conspiracy were the employees who were compelled to work longer hours, were compelled to violate union rules and regulations (established presumably to protect the health and safety of the painters and to maintain the quality of their work), and were subject to speedup practices. Also victimized by the conspiracy were the tenants of the apartments because the New York City Housing Authority approved inferior work. After Schonfeld assumed office he received numerous complaints that the Union's trade rules were being violated which indicated that practices forbidden by the applicable collective-bargaining agreements were still being carried on by paint contractors doing New York City Housing Authority work. To correct these abuses Schonfeld instructed the business agents and the stewards to see that the collective-bargaining agreements were properly observed and that everyone understood that there is a change in the Union's leadership and the Union was not determined to protect its members. The subject was also covered at various union meetings. However, this campaign was not successful. Schonfeld explained that there were so many projects where just a few painters worked for only a few days that it was difficult to police the jobs and also "to persuade the men that the old days of exploitation

and corruption are gone." The 10-rooms rule was therefore promulgated "as an index of the fact that violations /of the trade rules/are in fact occurring." The Union's thesis is that a qualified painter who does his work diligently but without violating the trade rules cannot paint more than 2 rooms per day or 10 rooms per week even on the easiest jobs, therefore, a violation of the 10-rooms quota necessarily indicates that a violation of the trade rules has occurred. According to Schonfield, the 10-rooms rule "really /has/ nothing to do with /a / production quota in the normal sense ... /but/ must be understood in terms of the determination to enforce the /trade/ agreement as far as the tools, as far as the hours, as far as the wages and /as far as/ our responsibility to the City /to insure that specifications are being observed/ are concerned." 3/

The 10-rooms rule was adopted by the Union at a special meeting held on March 5, 1968, specifically called "to discuss an act on problems connected

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3/ Witnesses for General Counsel vigorously contested Schonfeld's assertion that painters cannot paint more than two rooms per day without violating the standards established by the relevant collective-bargaining agreements.

with City Housing Re-painting." The minutes of the meeting show that Secretary-Treasurer Frank Schonfeld spoke about the increasing importance to the Union of work performed in Government housing projects and that "for a variety of reasons, this type of work in New York City has deteriorated to the point where impossible 'numbers' demanded by employers and working conditions make it difficult for a large section of our membership to seek employment on City work; an area which should provide the best type of work for our members since it must be done under Union conditions with rigid specifications, has, in fact, become one of the least desirable places to work. From a standard of one (1) room a day with a helper to wash kitchens and bath-rooms and help cover up, men are now compelled to turn out two and one-half to three rooms and more per day." He thereupon proposed the resolution, quoted below, which was adopted unanimously:

> WHEREAS, the Union has recently become increasingly aware that certain violations of the Trade Agreement have become prevalent in the performance of City Re-paint work, namely: the practice of lumping, failure to report real earnings to the Painting Industry Insurance Fund with consequent short changing of contributions

to the Pension, Welfare and Annuity Funds, the constant speed-up of Journeymen, the endangering of the health and safety of workers, the deterioration of standards of quality of work furnished to the City, and other undersirable effects on employers and employees; Now therefore, be it

RESOLVED, that notice be given to employers on City Housing Re-paint work, in order to furnish them with information essential to their making new bids on contracts for such work, that the Council hereby establishes the following Trade Rules:

(a) On City Housing Re-paint work, no Journeyman shall paint more than ten (10) rooms per week.

(b) This Trade Rule shall be effective so as to meet a bid deadline of April 1, 1968, or thereafter.

(c) As to jobs not yet subject to the foregoing Trade Rule, no Journeyman shall paint a greater number of rooms, or other areas, than shall be provided for by Union ruling made for the particular job

on which such Journeyman is employed. In this connection, the Union shall establish a presumptive maximum number of rooms per week for each City Housing Re-paint job, subject to review after presentation by the employer of evidence relative to such ruling.

Within a few days after the Union's special meeting various employers having contractual relationships with the Union, including the Charging Parties, were sent the following letter:

TO ALL EMPLOYERS SIGNED WITH DISTRICT COUNCIL NO. 9

SUBJECT: RE-PAINTING WORK ON NEW YORK CITY HOUSING AUTHORITY PROJECTS.

Gentlemen:

Please be advised that District Council No. 9 has taken action to impose a maximum production limit for its members on all City Housing repaint work of 10 rooms per 35 hour week. This will go into effect on all jobs bid hereafter. We are calling this matter to your attention for information and guidance.

On all jobs that have been previously bid, the following Trade Rule was adopted:

As to jobs not yet subject to the foregoing Trade Rule, no Journeyman shall paint a greater number of rooms, or other areas, than shall be provided for by Union ruling made for the particular job on which such journeyman is employed. In this connection, the Union shall establish a presumptive maximum number of rooms per week for each City Housing repaint job, subject to review after presentation by the employer of evidence relative to such ruling.

The above Trade Rule was adopted in order to eliminate abuses which have undermined standards of workmanship, caused cheating of the Insurance Fund and in general, were responsible for unfair competition.

The Union is particularly interested in eliminating "lumping" and other piece work practices.

Your cooperation is requested to the end that the public, the journeyman and the contractor can be dealt with fairly in the best interest of our industry.

The members of the Union were advised of the 10-rooms rule at membership meetings and through the Union's

bimonthly newspaper.4/

4/ The prominent, lead feature in the March--April, 1968 edition of the Union's newspaper is devoted to an article entitled, "Painting in City Projects: Cheap, Shoddy, and Scandalous." The headnote to the article is as follows:

> It takes a young back and a strong stomach to work for private contractors on city housing repaint work. You've got to start fast and keep moving all day under tension to keep your job; and you've got to learn how to do a quick, shabby, cheap piece of work. This is the story of the decline of a trade, the debasement of workers, the deterioration of homes. The result is exploitation and speed-up of painters, contempt for tenants, cheating of the city, and the degeneration of an industry.

Another article in the same edition of the paper describes the substance of the Union's 10-rooms rule.

After learning of the Union's promulgation of the 10-rooms rule and after having received protests from members of the Association about the rule, Louis Elkins, secretary of the Association, on March 15, 1968, wrote the following letter to the Union:

Reference is made to the circular letter recently addressed and issued by the Council "TO ALL EMPLOYERS SIGNED WITH DISTRICT COUNSEIL NO. 9", and entitled:

"SUBJECT: RE-PAINTING WORK ON NEW YORK CITY HOUSING AUTHORITY PROJECTS"

Obviously, the unilateral action taken by the Council on March 5, 1968, in adopting a rule which imposes a maximum production limit on its members on all City Housing re-paint work is contrary to the long established principle that the amount of work a man may perform shall not be restricted by the Union, nor by the representatives, officers, or members of the Union.

Even more significantly, however, the action of the Council constitutes a clear-cut violation of Article XXII of the Trade Agreement, which reads as follows:

"ART. XXII. During the life of this Trade Agreement neither party

to it shall continue in force or make any rule or by-law conflicting with its provisions."

* * * * * * * * * * *

Inasmuch as the proposed action of the Union, as described in the aforementioned circular letter, is, in our view, a plain violation of the Trade Agreement between the Union and the Association, we hereby formally request your immediate assurances to us either that the so-called "maximum production limit" rule described in your circular will be rescinded, or that the Union will refrain, during the life of our present Trade Agreement, from taking any action to implement such rule.

Your immediate acknowlegement and reply is requested.

Frank Schonfeld sent the following reply to Elkins on March 18, 1968:

In reply to your letter of March 13, 1968, regarding the right of our Union to impose a maximum limit on repainting of City Housing projects, please be advised as follows:

1. The Union's present position is not in conflict with any existing provision of the Trade Agreement and,

therefore, we cannot agree that it violates Article XXII.

2. As I pointed out to you in an earlier letter, conditions in this area of our work have deteriorated to such a point in terms of jeopardizing the health, safety and working standards of our members that emergency action was called for.

* * * * * * * * * * *

As a matter of historical record, it has become a long established principle on the part of the employers to unilaterally establish excessive minimum quotas on this type of work. Capable, qualified and conscientious mechanics who could not reach the arbitrary unrealistic quota have been restricted by employers from engaging in this work. As a result, workmanship and integrity in this field have been a constant source of scandal and complaint.

Whatever the Association chooses to do or not to do, the Union is determined to act to protect the health, safety and work opportunities of its membership and to reestablish the standing and reputation of our industry for craftsmanship and integrity.

On March 21, 1968, at a meeting with Schonfeld about other matters,

Elkins suggested to Schonfeld that the Union's alleged violation of the trade agreement through the adoption of the 10-rooms rule should be brought before the Joint Trade Board 5/ for decision and ultimate submission to arbitration if necessary. Schonfeld replied that the Union had not violated the trade agreement and therefore the matter was not arbitrable. Elkins responded that the Association can bring a court proceeding to compel arbitration to which Schonfeld answered that that was his privilege. About the same time representatives of the three Charging Parties, who were not members of the Association, had a meeting with Schonfeld where they protested the 10-rooms rule.

After the Union's promulgation of the 10-rooms rule in March 1968 several members of the Association complained to Elkins that some of their men were slowing down in production. Elkins informed them that the Association was discussing the matter with the Union.

5/ The Joint Trade Board, which is composed of three members of the Association and three members of the Union, exists under the terms of the parties' collective-bargaining agreements for the purpose of hearing and adjusting grievances or complaints.

According to Elkins, "I told them we don't want to start any wars, we don't want to rock the boat. Mr. Schonfeld is not a fellow with horns. He can be spoken to and perhaps something is going to happen. In the meantime I always try to convince them that we are approaching the time when our Agreement expires on July the 31st. /The then existing collective-bargaining agreement between the Union and the Association was for a 3-year period from August 1, 1965, to July 31, 1968./ I am making every effort to start negotiations bright and early .... Let's not start any wars and I certainly wouldn't be a party to it. Let's sit down at the bargaining table in a congenial atmosphere."

Upon the expiration of the subsisting collective-bargaining agreement on July 31, 1968, the Union called a strike which continued until a new contract was executed on September 9, 1968. Negotiations, however, were started in June 1968, before the strike began and continued during the strike. Approximately 20 to 25 bargaining sessions were held.

At the outset of the negotiations, the Union submitted a 5-page document setting forth its bargaining demands. Among these demands was the following: "The Union shall have the right to

establish a maximum standard of production." This demand was not limited to New York City Housing Authority work and therefore was broader in scope than the 10-rooms rule which was promulgated by the Union in March 1958. The Association, in turn, presented to the Union a list of 38 counterdemands. Included among these demands is the following:

> 31:--ARTICLE XXII on page 28--
> CHANGE TO READ:
>
> During the life of this Trade Agreement neither party to it shall promulgate any rules establishing a standard of production, or continue in force, or make any rules or by-laws conflicting with its provisions.

This demand was abandoned by the Association relatively early in the negotiations.6/

6/ Louis Elkins and Bernard Bierman, both of whom were members of the Association's negotiating committee, testified that the Association had not included in its demands any item to the effect that the Union should withdraw the rule limiting production on New York City Housing project jobs. When these gentlemen testified, they did not have before them a copy of the Association's demands. Both Elkins and Bierman impressed me as (continued)

The Union's demand for a provision authorizing it to establish production quotas was discussed at meetings held on July 26 and August 19, 1953. The Association was firm in its rejection of this demand. According to Schonfeld, "/w/hen we /the Union/ could not make any headway on that score, we then proceeded to a particular demand that this production limitation should apply to the

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6/ being intelligent, truthful, and possessed of reasonably good memories. The error in their recollections concerning the Association's demands reflects not any effort on their part to dissemble but rather that the negotiations were protracted, argumentative, and complicated. In such circumstances, absent minutes or comprehensive notes, recollections become uncertain. Furthermore, both Elkins and Bierman explained at some length why it was unnecessary for the Association to present any such demand. This reflects an often observed phenomenon that memory after a period of time tends to accommodate itself to an individual's beliefs and desires even at the expense of accuracy.

city housing...."7/

The last discussion during the 1968 contract negotiations about production quotas took place on September 3. This was the so-called "breakthrough" meeting. At this meeting the major differences between the bargaining parties were resolved. The parties executed a contract on September 9 and the strike which had been in progress since August 1 was terminated. The new contract which is effective from September 9, 1968, through July 31, 1971, contains no change whatsoever from the terms of the preceding contract insofar as it relates to the question of the Union's right to establish production quotas. Article XXII of the previous contract was incorporated verbatim in the new agreement. It, however, has been renumbered as article XXIII.

General Counsel contends in his brief that "/i/t was the agreement of the parties that these proposals

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7/ There is no dispute that most of the discussion relating to the Union's demand for the right to establish production standards was limited to the Union's right to establish standards for New York City Housing Authority work."

/relating to the Union's authority to establish production quotas/, raised and discussed and rejected, were to remain as not constituting terms or conditions of employment."3/ The Union on the other

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3/In support of this position General Counsel makes the following argument: "Each time the Union raised its proposal in negotiations for this addition to the contract which would have the effect of changing the existing terms and conditions of employment concerning work limitation, the Association categorically rejected it. Furthermore -- and this is most significant -- the course of negotiations with respect to this issue, the manner of its rejection, the reaction of the Union negotiators to the rejection and the resulting continued absence of any reference to the rejected proposal in the contract agreed upon, occurred in the same amnner as the parties disposed, by agreement, of other Union proposals for contract innovations which were rejected by the Association, which failed to appear in any form in the contract and which were not again referred to or attempted to be implemented by the Union after the contract was signed." This argument is based upon a fallacious assumption of fact, namely, that the 10-rooms per man per week limitation had not already been effectively promulgated by (continued)

hand takes the position that during the bargaining negotiations, particularly at the crucial September 3 meeting, the Association agreed that the Union could maintain its 10-rooms per man work limitation on New York City Housing Authority projects if such rule were not unlawful. I do not accept either position.

I find that the parties were unable to reach any agreement at the September 3 meeting with respect to the production quota problem. Rather than permit this issue to interfere with the consummation of a contract and the termination of the strike, the parties

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8/ the Union. The proposal of the Union in this regard was for a contract provision which would specifically recognize the Union's authority to do what it had already done and, contrary to General Counsel, was not a "proposal in negotiations ... which would have the effect of changing the existing terms and conditions of employment." Furthermore, I do not concur with General Counsel's interpretation of what occurred at the negotiations and my findings are contrary to those advanced by General Counsel in his brief and in his arguments at the hearing.

merely dropped the entire subject just as if it had never been raised as part of the negotiations. Accordingly, I find that the Union's work limitations rule, which it adopted on March 5, 1968, continued thereafter through the period of the negotiations and subsequent thereto. I further find that the attitudes of the respective parties, certainly as late as September 9, 1968, when the new collective-bargaining agreement was executed, remained exactly the same as they were prior to the commencement of negotiations, that is, the employers were contending that the work limitations rule constituted a breach of the collective-bargaining agreement and was otherwise unlawful, while the Union was arguing to the contrary.9/

9/ Four members of the Association's negotiating committee testified to the events at the bargaining sessions and three witnesses for the Respondent testified to such events. There is substantial conflict as to what transpired particularly at the September 3 meeting, not only between General Counsel's witnesses and the Union's witnesses, but also among the witnesses for the respective parties.

The September 3 bargaining meeting was divided into three sessions separated by the lunch and dinner breaks. Bernard Bierman, a member

After the strike ended on September 9, the Union continued with its efforts to induce or compel its

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9/ of the Association's negotiating committee, testified that at this meeting, after he made a vigorous argument in opposition to the production quota, "Mr. Schonfeld as he was accustomed to doing during many of these things" shrugged his shoulders. "There was no reply and it was just dropped. And Mr. Elkins at that point ... said, 'Forget it, it's over. That's the end of this issue.'" Bierman explained further, "I think Mr. Schonfeld never at any time that I recall said, 'All right, we give in on this point.' He didn't say it in those words. He merely dismissed it with a shrug, the way he did with this thing. There was no discussion necessary. It was over. It was finished. If he wanted to continue---if he refused to take it, then we would have to bargain further, but once the thing was over, it was over."

Louis Elkins, executive secretary of the Association and a member of its negotiating committee, generally agreed with Bierman as to this particular event. According to Elkins:

On September the 3rd, which was

membership to observe the 10-rooms rule. The Association and individual employers lodged protests with the Union about the

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9/ the last time when we discussed this particular subject, the union -- whatever they had to say -- said it or whoever said it and we spoke about it. When it was over, it was my impression that the union was sold a bill of goods by our arguments and that it was finished, period. The same as other matters. The same as other provisions. They didn't exactly say we withdraw it or we don't withdraw it. They didn't pursue it any further. As a matter of fact, when we met on the following day, which was the 4th of September, when we were just winding up everything, they didn't bring it up. When they didn't, we felt it was completed. When Mr. Bierman got through, I believe he was the last speaker on the subject, I think he sold them a bill of goods and they were satisfied among themselves that, boys, we can't get it; let's forget about it. That was my impression. And I believe that was it.

Somewhat inconsistently Elkins also testified that although he was getting no

matter. The evidence shows that the rule was not uniformly observed by the Union's membership. According to the testimony

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2/ place in his efforts to persuade the Union to rescind the 10-rooms rule which it had promulgated in March 1968, "we had hoped that the thing would die a natural death." Although according to Elkins, the rule had not died a natural death by July 1968 when negotiations were begun, he testified that "as soon as the negotiations were completed, we had hoped that the Union on the basis of Article XXIII of the new Agreement, that the Union would not intensify its activities in enforcing the ten room limitation."

Sid Schiller, another member of the Association's negotiating committee, although in various respects differing in his version of the transactions from the other witnesses, generally corroborated Bierman and Elkins as to how the production quota question was concluded. Schiller testified that after Bierman spoke against the Union's proposal, Mr. Brodsky, another member of the Association's negotiating committee, said something to the effect, "there's your answer," and "Mr. Schonfeld shrugged back and then we proceeded with other business on hand.

of various employers, after September 9, although production was considerably less than it should have been, it exceeded

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9/The testimony of George Peck, president of the Association, differs in many material respects from that of Elkins, Bierman, and Schiller. According to Peck, after the luncheon recess, "I broke out and said that the association would never go for a scale of production in any phase of its business .... I don't recall anything that was said after that; it was held in abeyance and we went to other points of the negotiations .... we did not talk about it in the evening." Peck affirmed that what happened at the negotiations with respect to the production quota issue was that the employer's demand was dropped and the Union's demand was dropped. The employer's group maintained that what the Union had been doing was legal and that is the way the matter ended. Peck further testified that it was his impression that the Union had abandoned the 10-rooms limitation demand. Peck explained that he gained this impression from a private discussion with two representatives of the Union (he avoided giving their names on the ground that to do so would violate a confidence), neither of whom was Schonfeld or the Union's attorney, during which he was

10 rooms per week per man on New York City Housing Authority work. Despite threats made by the Union to its membership to

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9/told "that they /the Union/ would abandon that point /production quota/ in order to facilitate and make an agreement." Peck further testified that this private discussion was the sole basis for his impression that the Union would abandon its 10-rooms production limitation and that he did not seek any authoritative confirmation of the statement.

The testimony of the Union's witnesses is generally to the effect that the Union did not at any time or in any manner indicate during the negotiations that it would withdraw or rescind the work production rule, promulgated on March 5, but to the contrary that it understood from certain statements made by the Association's negotiators that the Association had no objections to the continuation of the rule if it was not in violation of other terms of the Agreement or was not otherwise unlawful.

compel observance of the 10-rooms rule, no member of the Union was disciplined by the Union for his violation of the rule. On the other hand, various employers testified that on occasions they discharged painters because the employees were restricting output in observance of the Union's 10-rooms rule and on several occasions docked employees for time not worked because the employees left the job after having completed either 2 rooms in a day or 10 rooms within the week. In none of these cases did the Union file any grievance against the employer. Thus, so far as the record shows, the situation since September 9 has been that the Union has been contending that the rule is lawful and has been seeking to enforce it through appeals to and pressures upon its membership, while on the other hand, the employers have been contending that the rule is unlawful and some employers have disciplined employees for allegedly reducing output in observance of the rule.

IV. Conclusions

The Respondent promulgated its 10-rooms rule and began to apply it in March 1968. The charge in this proceeding was not filed until December, more than 6 months later. The complaint alleges that the Union promulgated the rule in disregard of its obligation to first bargain about the subject and

thus has violated Section 8(b)(3) of the Act. I find that if there was an obligation on the part of the Union to bargain about the rule, such obligation matured in early March 1968. It is unnecessary, therefore, to consider whether the evidence establishes a substantive violation of the Act because this proceeding is barred by Section 10(b) which provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made..."10/

General Counsel contends that Section 10(b) is inapplicable here and

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10/ Durfee's Television Cable Company, 174 NLRB No. 98. Charging Party contends that between March and September the parties entered into a new contract, had been involved in a strick, and had negotiated about the work production limitation and that these factors present a wholly new situation in September "when the Union again unilaterally reimposed a work production limitation." I find contrary to Charging Party, that the Union did not reimpose a new rule in September, but continued to maintain the same rule that it had promulgated in March.

advances three arguments in support of this position.

First, General Counsel contends that with respect to at least five of the eight Charging Parties the rule was not implemented until after September 9, 1968.11/ Assuming this to be the fact, General Counsel does not explain why for the purposes of Section 10(b) the measuring period begins in September rather than in March. It is General Counsel's position that the Union's 10-rooms rule constituted a change in a condition of employment. Because the term "conditions of employment" includes all facets of the employment relationship, future as well as present, a condition of employment is altered when a change has been effectively promulgated not when it becomes operative. For example, if in January an employer

11/ By this statement General Counsel is referring to testimony by officials of various companies that the effect of the rule upon their operations had not become apparent until after September 9. However, the employees of these companies had been advised in March 1968 of the adoption of the rule and had then been exhorted in the Union's official newspaper and at union meetings to cooperate with the Union in the observance of the rule.

announces that his employees' summer vacations will be increased by 1 week, the change in the employees' conditions of employment relating to vacations occurred when the announcement was made rather than when the employees begin to enjoy their new vacation benefits. Similarly, if an employer announces a deferred wage increase -- the date of the announcement rather than the operative date of the new wage rates is the date on which the change in the conditions of employment occurred. General Counsel recognizes that the 10-rooms rule as promulgated contemplated deferment of its implementation in some circumstances.12/ As the alleged vice in the Union's conduct was to change or attempt to change a condition of employment, that date in March on which it announced the rule is the date from which the alleged violation of its

12/ In his brief General Counsel points out that "The resolution contained a built-in provision for deferment of its implementation until all current bid deadlines had been met (R--2), and in the case of at least one of the Charging Parties there were no bids on new work from March until October or later (Tr. 367--1 through 13), during which time he was not subject to the maximum room limitation (Tr. 366--6)."

bargaining obligations began rather than the various dates upon which the operation of the rule began to affect the individual employer's production.

General Counsel's second argument is that this "case presents a situation where an illegal practice was promulgated more than 6 months prior to the date of filing of a charge, and was additionally maintained and enforced within the 6-month period." This argument and the cases cited by General Counsel in support are inapposite. Enforcement of a work limitations rule is not per se a violation of the Act.13/ Thus, as in the Bryan case, 14/ any violation within the 6 months period can be spelled out only by first finding that an unfair labor practice occurred prior thereto.

General Counsel in support of his position argues:

> This not to say that any Union work limitation rule is illegal, but rather that the particular one in our case, under the cir-

13/ See Scofield v. N.L.R.B., 394 U.S. 423 (1969)

14/ Local Lodge No. 1424, International Association of Machinists /Bryan Manufacturing Co./ v. N.L.R.B., 362 U.S. 411.

> cumstances of our case, is. We have already pointed out how the agreement of the parties not to adopt any form of work limitation must be implied from the background and attendant circumstances, and is reflected in the continued absence of any reference to work limitation in the contract. Because of the parties' agreement to continue to treat the matter in a negative manner, a consideration of the work limitation rule as enunciated, even in connection with a literal reading of the contract, would not reveal the intrinsic illegal nature of the rule in our case. But the impact of the Union's rule does become plainly revealed upon consideration of the background of the elucidating established practice, Union attempt at change, employer resistance to the proposed change and Union capitulation as reflected in the continuation of the same contract treatment of the subject.

To the extent that this argument depends upon the quoted state of facts the argument fails because I have found that the evidence does not support the factual premise on which General Counsel relies.

General Counsel's final argument is as follows:

> In addition to the fact that the Union as a general practice maintained and gave effect to its 10-room rule within the 10(b) period, there is a further argument stemming from the fact that the changes in terms and conditions of employment, and contrary to the terms of the contract, were effected by the Union rather than, as in the more typical situation, by the employer. Normally, the employer having control of the production process, the unilateral change is effected upon his decision to make the change. The power to implement follows naturally upon the decision. Where, however, the change is imposed over the objection of the one who normally controls the production process, as here, the process is not accommodated to the change and the change occurrs only when the union is successful in imposing it, and therefore it occurs each time it is imposed. It is not adopted as part of the system; it is forced upon the system each time it is applied. It is a series of repeated events,

each one a violation. In our case, then the Union's rule, unilaterally imposed as it was, violated Section 8(b)(3) each time it was thus imposed.

For generally the same reasons given above, I find no merit to this argument.

Conclusions of Law

Respondent has not violated Section 8(b)(3) of the Act as alleged in the complaint.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record, I recommend that the complaint in this case be dismissed in its entirety.

Dated at Washington, D.C.

SUPREME COURT, U. S.

JUN 8 1972

No. 71-1340

In the Supreme Court of the United States

OCTOBER TERM, 1971

NEW YORK DISTRICT COUNCIL NO. 9, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

and

ASSOCIATION OF MASTER PAINTERS AND DECORATORS OF THE CITY OF NEW YORK, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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